St. Vincent Hospital, LLC and United Food and Commercial Workers International Union, Local 1445, AFL-CIO. Case 1-RC-21717

April 29, 2005

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections and determinative challenges in an election held February 27, 2004, and the judge's decision recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 218 for and 207 against the Petitioner, with two void ballots and 21 challenged ballots, a sufficient number to affect the election results.

The Board has reviewed the record in light of the exceptions and briefs and has adopted the judge's findings[1] and recommendations only to the extent consistent with this Decision and Direction.

Background

The Employer is a hospital in Worcester, Massachusetts. The Employer operates four facilities: the Medical Center at 20 Worcester Center Boulevard (Medical Center), which is the Employer's principal facility; the Vernon Hills facility at 25 Winthrop Street (Vernon Hills), which is located about two miles from the principal facility and houses a psychiatry unit, an ambulatory clinic, radiation oncology, and a purchasing department; and the 10 and 20 Washington Square facilities, which are located across the street from the Medical Center. The 10 Washington Square facility houses the facilities department, and the 20 Washington Square facility houses the finance, payroll, and accounting departments, part of the information systems department, and the Employer's business office.

On January 21, 2004,[2] the Employer entered into a Stipulated Election Agreement (Agreement) with the Petitioner providing that an election would be conducted on February 27 among employees in an appropriate collective-bargaining unit consisting of all full time and regular part time "nonprofessional" employees—including, inter alia, clerks, secretaries, patient care assistants (PCAs), aides, and assistants—employed at the Employer's Medical Center and Vernon Hills facilities. The Agreement did not include employees employed at the 10 or 20 Washington Square facilities.

At the election, the Employer, the Petitioner, and the Board agents, variously challenged the ballots of the following 21 employees: Karla Aubin, Ife Bath, Kathy Bernard, Michelle Cormier, Linda Goding, Lisa Hall, Yvonne Jones, Erin Keller, Jane Lantz, Elizabeth Lidonde, Melissa Marcucci, Lynne Mello, Donna Mosher, Jennifer Nedoroscik, Roberta Ohman, Kim Pilat, Ellen Randall, Jose Rubio, Alan Wesson, Kathy Zack, and Michelle Zaleski.[3]

Following the election, the Employer and the Petitioner also filed timely objections on March 5 to the conduct of the election and conduct affecting the election results. The Petitioner, however, subsequently withdrew its objections.

On April 26, the Regional Director issued a Notice of Hearing and Report on Challenges and Objections, in which she resolved nine of the challenged ballots pursuant to the agreement of the parties. In this report, the Regional Director found, inter alia, that Hall and Pilat were eligible voters because they were employed in positions included in the proposed unit, and she noted that the Petitioner had withdrawn the challenge to their ballots.[4] In addition, the Regional Director noted that the Petitioner had withdrawn its challenges to the ballots of Mosher and Nedoroscik because they were employed in unit positions; and, the parties agreed that Lantz and Mello were also eligible voters. The Regional Director also stated that the parties further agreed that Keller, Wesson, and Zack were not eligible voters.

Additionally, the Regional Director determined that the two "void" ballots should be counted as "No" votes.[5]

[1] The judge was sitting as a hearing officer in this representation proceeding.

The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957). We have carefully examined the record and find no basis for reversing the findings.

[2] All dates are in 2004, unless otherwise noted.

[3] In addition, two ballots were marked as "void" because they had the word "No" written in both the "Yes" and "No" boxes on the ballots.

[4] The Petitioner later filed a Motion to Reconsider and Amend Report on Challenged Ballots on the grounds that, after the Petitioner had withdrawn its challenges to the ballots of Pilat and Hall, it discovered evidence that they possessed supervisory authority. The Regional Director granted this motion on May 4. Thus, the eligibility of Hall and Pilat was considered at the hearing.

[5] In one of its objections (Objection 16), the Employer alleges that Board officials' refusal to count these ballots as "No" votes was improper. Although the Regional Director determined that the ballots should, in fact, be counted as "No" votes, the Employer's objection was apparently still outstanding, and it was therefore considered at the hearing.

Following a hearing on the Employer's objections and the 14 remaining challenges, the judge, in his Decision on Objections and Challenges, recommended overruling the Employer's objections in their entirety. The judge further recommended sustaining the challenges to the ballots of Aubin, Cormier, Goding, Lidonde, Marcucci, Rubio, and Zaleski; and, he recommended overruling the challenges to the ballots of Bath, Bernard, Hall, Jones, Ohman, Pilat, and Randall.

Both the Employer and the Petitioner filed with the Board timely exceptions to the judge's Decision on Objections and Challenges. The Employer excepts to the judge's recommendation to overrule its Objections 8-15, 17-18, 22, and 25,[6] and to the judge's recommendation to sustain the challenge to the ballot of Marcucci. The Petitioner excepts to the judge's recommendation to sustain the challenge to the ballot of Goding and overrule the challenges to the ballots of Bernard, Hall, Ohman, and Pilat.

For the reasons stated by the judge, we agree with the judge's recommendation to overrule Objections 8–15,[7] 17–18, 22, and 25, and we therefore adopt his recommendation to overrule the Employer's objections in their entirety.[8] The dissent asserts that the presence of two unidentified employees in the voting booth at the same time compromised the integrity of the election because it impugned the secrecy of the ballots. Although this incident may not have represented an ideal election condition, we disagree that it compromised the integrity of the election. A witness for the Union testified that the Board agent stopped one of the two employees from going into the booth with the other employee before they even got into the booth. A witness for the Employer testified that the two employees did go into the booth together but the Board agent separated them when this was brought to his attention. The judge did not resolve this conflict in testimony. However, even if the two employees at issue were in the voting booth at the same time, there is no evidence that they communicated or that either observed how the other was marking his or her ballot. In fact, there is no evidence that the two employees had even marked their ballots while they were in the voting booth together. Thus, the evidence in the record fails to establish that the secrecy of the ballots was impugned as a result of the employees' simultaneous presence in the voting booth. In this regard, this case is factually distinguishable from *Machinery Overhaul Co.*, 115 NLRB 1787 (1956), cited by the dissent, where the evidence showed that the two employees who were in the voting booth at the same time "each observed how the other marked his ballot." Id. at fn. 2. Accordingly, we find that the Employer, "upon whom the burden of proof rested," *NLRB v. Mattison Machine Works*, 356 U.S. 123, 124 (1961), failed to demonstrate that objectionable conduct occurred.

Like our colleague, we recognize that ballot secrecy is an integral component of a fair election that must be safeguarded. However, there is not a "per se rule that representation elections must be set aside following any procedural irregularity." *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d. Cir. 1990). Here, all the record shows is that two people were in the voting booth at the same time. Absent any further showing, we are unwilling to presume that ballot secrecy was compromised.

We further agree with the judge's recommendation to sustain the challenges to the ballots of Marcucci and Goding and to overrule the challenges to the ballots of

[6] In brief, these objections variously allege that the Petitioner improperly used employees' photographs in its campaign materials without their permission; that the Board agents engaged in misconduct and conducted the election in a lax and inattentive manner; that the method for identifying voters was inadequate; that certain eligible voters were disenfranchised; and that improper communications occurred between Petitioner observers and voters during the election.

The Employer also excepts generally to the judge's recommendation to overrule "all" of its objections. However, the Employer does not specifically except to the judge's recommendation to overrule Objections 1–7, 16, 19–21, and 23–24—as it does with respect to Objections 8–15, 17–18, 22, and 25—nor does it discuss these Objections in its exceptions brief. Thus, in these circumstances, we find that the Employer has not properly excepted to the judge's recommendation to overrule Objections 1–7, 16, 19–21, and 23–24.

[7] In adopting the judge's recommendation to overrule Objection 8—which alleges that the Petitioner improperly used certain employees' photographs in its campaign materials without their permission—we rely only upon the credited testimony of Petitioner representative Kathleen Keller. Keller testified that, prior to taking the photographs of the employees at issue, she explained to the employees that the photographs would be used in preelection campaign materials, and the employees then agreed to have their photographs taken. The judge found, and we agree, that this testimony establishes that the Petitioner used the photographs with the express permission of these employees, and thus its use of the photographs was not objectionable.

Accordingly, we find it unnecessary to rely upon the judge's additional finding, based on *Hollywood Ceramics*, 140 NLRB 221 (1962), that the Petitioner's use of the photographs did not constitute a "substantial departure from the truth" and therefore did not constitute an objectionable misrepresentation. Member Liebman further observes that *Hollywood Ceramics*, supra, was expressly overruled in *Midland National Life Insurance*, 263 NLRB 127 (1982). Thus, in her view, the judge erred in analyzing this issue under *Hollywood Ceramics.*

[8] In the absence of exceptions, we adopt, *pro forma*, the judge's recommendation to overrule the Employer's remaining objections—i.e., Objections 1–7, 16, 19–21, and 23–24.

In adopting the judge's recommendation to overrule Objection 16—which alleges that Board officials improperly refused to count the two "void" ballots as "No" votes—we affirm the Regional Director's postobjection determination that these ballots should indeed be counted as "No" votes.

Hall, Ohman, and Pilat.[9] Thus, we find that the ballots of Hall, Ohman, and Pilat should be opened and counted.

However, for the reasons set forth below, we disagree with the judge's recommendation to overrule the challenge to the ballot of Bernard. Accordingly, we reverse the judge and sustain the challenge to her ballot.

Analysis

Brenda Bernard is a department secretary at the Employer's 10 Washington Square facility. Although the Agreement lists "unit secretaries" as an eligible classification—and this ostensibly includes Bernard's job classification—the Petitioner challenged Bernard's ballot on the grounds that the Agreement expressly includes only employees who are employed in eligible classifications at the Medical Center and Vernon Hill facilities, and it does not include employees employed at 10 Washington Square.

The judge—apparently applying the Board's community-of-interest test—found that, even though Bernard was employed at a facility not listed in the Agreement, she should nonetheless be included in the unit because she was employed in a covered classification and she worked across the street from, and in the course of her duties sometimes traveled to, the Medical Center facility. The judge further noted that employees who worked at the 10 Washington Square facility are able to park in the same parking lot used by the employees who work at the Medical Center and that the 10 Washington Square facility operates under the same procedures and labor relations policies as does the Medical Center and Vernon Hills facilities. On these bases, the judge implicitly found that Bernard shared a sufficient community of interest with the unit employees at these facilities to warrant her inclusion in the unit. In so finding, the judge noted that, prior to entering into the Agreement, the Employer had proposed including the department secretaries employed at 10 and 20 Washington Square in the unit.

For all of these reasons, the judge recommended that the challenge to Bernard's ballot be overruled and that her ballot be opened and counted.

In excepting to the judge's recommendation, the Petitioner contends that the unit description in the Agreement does not include employees employed at the 10 Washington Square location and that the challenge to Bernard's ballot should therefore be sustained. We find merit in the Petitioner's exception.

The Board applies the three-part test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002), to determine whether a challenged voter is properly included in a stipulated bargaining unit. Pursuant to this test, the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the eligibility of the challenged voter by employing its community-of-interest test. *Id.* at 1097.

Applying the first prong of the *Caesar's Tahoe* test here, we note that the stipulated unit description in the parties' Agreement unambiguously includes only those employees working in the covered classifications at the Medical Center and Vernon Hills facilities; it does not include employees working at the 10 Washington Square facility, where Bernard is employed. Thus, regardless of the fact that Bernard is employed as a secretary, the intent of the parties that employees working at the 10 Washington Square facility be excluded from the unit is unambiguously manifested in the stipulated unit description. *See Northwest Community Hospital*, 331 NLRB 307, 307 (2000) (The Board will find that the parties have "a clear intent to include those classifications matching the description and a clear intent to exclude those classifications not matching the stipulated unit description.").

In light of the parties' clear and unambiguous intent to exclude those employees, the judge erred in relying upon extrinsic evidence of the Employer's pre-Agreement proposal to include department secretaries at 10 Washington Square in the unit, and in applying the Board's traditional community-of-interest test, to reach a finding that Bernard should be included in the unit. *See Caesar's Tahoe*, supra. Accordingly, we reverse the judge and sustain the challenge to Bernard's ballot. *See, e.g., S & I Transportation, Inc.*, 306 NLRB 865 (1992) (sustaining the challenge to the ballot of an employee who worked in a covered classification on the grounds that he was excluded from the unit because he worked at a different facility from that described in the unit description.).

[9] In the absence of exceptions, we adopt, pro forma, the judge's recommendation to sustain the challenges to the ballots of Aubin, Cormier, Lidonde, Rubio, and Zaleski, and to overrule the challenges to the ballots of Bath, Jones, and Randall; thus, we find that the ballots of Bath, Jones, and Randall should be opened and counted. Additionally, in accord with the parties' prehearing resolution of several of the ballot challenges, we find that the challenges to the ballots of Keller, Wesson, and Zack should be sustained, and that the ballots of Lantz, Mello, Mosher, and Nedoroscik should be overruled and their ballots opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision and Direction, count the two "void" ballots as "No" votes; open and count the ballots of Ife Bath, Lisa Hall, Yvonne Jones, Jane Lantz, Lynne Mello, Donna Mosher, Jennifer Nedoroscik, Roberta Ohman, Kim Pilat, and Ellen Randall; prepare and serve on the parties a revised tally of ballots; and issue the appropriate certification.

Dated, Washington, D.C. April 29, 2005

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to the judge and my colleagues, I find conditional merit in the Employer's objections insofar as they allege that the integrity of the election was compromised. My colleagues assume arguendo that two employees were permitted in a voting booth at the same time. They nonetheless uphold the election. I disagree. A principal hallmark of a Board election is the requirement for a secret ballot election. Obviously, such secrecy is compromised if two or more employees are in the voting booth together.[10] If the secrecy affects a determinative number of ballots, the election will be set aside.[11]

My colleagues would not set the election aside unless it were shown that the employees communicated with each other or that each employee observed how the other marked his/her ballot. I disagree with that test. The whole point of having a voting booth is to give an absolute assurance to each employee that there is no *opportunity* for his/her marked ballot to be seen by anyone else. Obviously, if two employees are in the same small booth together, there can be no such assurance. I would insist upon absolute secrecy in our secret ballot elections.

Accordingly, I would remand the case to the Region to: open and count the ballots of Ife Bath, Lisa Hall, Yvonne Jones, Jane Lantz, Lynne Mello, Donna Mosher, Jennifer Nedoroscik, Roberta Ohman, Kim Pilat and Ellen Randall; count the two "void" ballots as "No" votes; and prepare and serve on the parties a revised tally of ballots. If that revised tally of ballots shows that the number of compromised votes was determinative, I would set aside the election.

In all other respects, I agree.

Dated, Washington, D.C. April 29, 2005

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

Eryn Doherty, Esq., counsel for the Regional Office.

Warren Pyle, Esq. and Catherine Highet, Esq., Pyle, Rome, Lichten and Ehrenberg, P.C., counsel for the Petitioner.

Bart Sisk, Esq. and Todd Photopulos, Esq., Butler, Snow, O'Mara, Stevens & Cannada, PLLC, counsel for the Employer.

DECISION ON OBJECTIONS AND CHALLENGES

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 4 and 5, 2004[1] in Boston, Massachusetts and on June 15, 16, and 17 in Worcester, Massachusetts. The hearing addressed numerous challenges and objections to the election conducted on February 27.

I. BACKGROUND

On January 21, Saint Vincent Hospital, LLC, herein the Employer, and United Food and Commercial Workers International Union, Local 1445, AFL–CIO, herein the Petitioner and/or the Union, entered into a Stipulated Election Agreement, herein called the Agreement, providing for an election to be conducted on February 27 at four time periods, three of which, from 6 a.m. to 9 a.m., 2 p.m. to 5 p.m., and from 10 p.m. to 12:00 midnight, were at 20 Worcester Center Boulevard, the Employer's principal location, and referred to herein, at times, as the Medical Center, and one session, from 11 a.m. to 1 p.m., at 25 Winthrop Street, generally referred to as the Vernon Hills location, both located in Worcester, Massachusetts. As to the appropriate collective-bargaining unit, the Agreement provides that the unit shall include:

> All full time and regular part time nonprofessional employees and those per diem and casual nonprofessional employees who meet the eligibility standard described under "payroll period of eligibility"[2] who are employed by Saint Vincent Hospital, LLC at its facilities at 20 Worcester Center Boulevard and 25 Winthrop Street, Worcester, Massachusetts, in the classifications listed below:
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> INCLUDING:
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> Anesthesia technicians
> Administrative department secretaries (except Information Systems Dept. Secretary)

[10] See *Machinery Overhaul Co.*, 115 NLRB 1787 (1956).

[11] Id.

[1] All dates referred to herein relate to the year 2004 unless otherwise stated.

[2] The Agreement, under the title "Payroll Period for Eligibility-The Period Ending" states:

11:59 p.m. Saturday January 17, 2004. Also eligible are per diem and casual employees in the classifications included in the Appropriate Bargaining Unit who have worked a minimum of 120 hours in either of the two consecutive 13- week periods ending 11:59 p.m. Saturday January 17, 2004.

Building services aides (Housekeeping)
Buyers and senior buyers
Call center representatives
CATH lab transport aides
Clerk/receptionists
Concierges
Critical care technician assistants (CCT)
Data analysts (QA/PI/QM analysts)
Dieners
Discharge liaisons
EKG technicians
Endoscopy technicians
ER materials supply coordinators
ER billers
General clerks (Medical photography)
Imaging assistants
Inventory clerks
Inventory representatives
Library assistants
Mailroom group leaders
Medical assistants
Medical staff services coordinator
Mental health assistants
Nursing office coordinator
Nursing assistants (surgical observation)
Office coordinators (except public relations office coordinator)
OR aides
OR billers
OR inventory representatives
OR scheduler/unit secretaries
OR scheduling coordinators
Orthopedic technicians
Patient Care Assistants (PCA)
Patient observer assistants
Patient transporters
Photo lab assistants
Pulmonary technicians
Radiology information systems (RIS) assistants
Receivers (Materials management)
Residency program assistants
Scheduling coordinators
Sterile processing department (SPD) aides
Storekeepers (Housekeeping dept.)
Trauma registrar
Unit secretaries
Volunteer assistants
Waste handlers

Excluding: all other employees, managers, professional employees, technical employees, skilled maintenance employees, business office clerical employees, guards and supervisors as defined in the National Labor Relations Act.

Throughout this Decision, the above shall be referred to as the unit. On the same day, the parties also entered into a Stipulation providing that the following classifications are among those excluded from the appropriate bargaining unit, referred to herein as the excluded classifications: Administrative Assistant (President's Office), Audiologist, Lead Anesthesia Tech, Audiovisual Coordinator, Behavioral Counselor, Bio Med Tech III, Call Center Rep Lead, Cardiac Arrhythmia Tech, Cardiovascular Tech, Case Cart Tech, Case Manager Psych, Childbirth Educator, Concierge Voc Student, Dispatch, Dosimetrist, Echo Tech, Education Coordinator, EEG Tech, EKG Tech Group Leader, Electrician ER Mental Health Clinician, Executive Assistant (President's Office), Exercise Physiologist, HR Representative, HR Specialist, HR Assistant, All Information Systems Department Employees, Invasive Cardio Materials Tech, All LPNs, Maintenance Tech, Maintenance Tech Lead, Mammography Tech, Medical Residency Program Coordinator, Perfusionist, Plumber Lead, Polysomnography Tech, All other Medical Records Department Employees, MRI Tech, Occupational Therapist, Certified Occupational Therapy Assistant (COTA), OR Air Lead, OR Materials Rep Lead, ORSOS Coordinator, Pastoral Care Dept, Patient Accounting Department, Patient-Guest Relations, Payroll Clerk, PCA Voc Student, Pharmacy Inventory Clerk, Pharmacist, Clinical Research Pharmacist, Pharmacy Inventory Coordinator, Pharmacy Tech Certified, Pharmacy Tech Non-Certified, Physical Therapist, Physical Therapy Assistant (PT Assistant), Public Relations Coordinator, Radiation Safety Specialist, Rad-Tech Multi Modality, Radiation Therapy Tech, Respiratory Tech/Therapist, RIS App Specialist, Risk Specialist, Site Service Team Leader, Social Worker MSW, Social Worker BSW, Spec Pro/CATSCAN Tech, Surgical Pathology Assistant, Surgical Tech, Surgical Tech Lead, All Security Dept Employees, Speech Therapist, SPD Tech Cert, SPD Tech Non-Cert, Telecom Operators, Translators, Ultra-Sound Tech, Ultra-Sound Tech SR, Vascular Tech, Vascular Tech SR, All Morrison's Employees, All ARAMAK/Service Master Employees, All Path Lab/Lab Corp Employees.

At the election conducted on February 27, the Tally of Ballots was:

Approximate number of eligible voters	485
Void ballots	2
Votes cast for the Petitioner	218
Votes cast against participating labor organization	207
Valid votes counted	425
Challenged ballots	21
Valid votes plus challenged ballots	446

On March 5, the Employer and the Petitioner[3] each filed timely objections to the conduct of the election and conduct affecting the results of the election. On April 26, the Regional Director issued a Notice of Hearing on Report on Challenges and Objections wherein she resolved a number of the challenged ballots pursuant to agreement of the parties.[4] Aside from the chal-

[3] In his brief, counsel for the Petitioner stated that as he had offered no evidence in support of the Petitioner's objections, "they may be dismissed or regarded as withdrawn." I construe this as a motion to withdraw the Petitioner's objections, which motion is granted.

[4] In this Report she found, *inter alia*, that Lisa Hall and Kim Pilat were eligible voters as the Petitioner withdrew its challenge to their ballots as the evidence established that they were employed in positions included in the unit as described by the Agreement. However, at the commencement of the hearing herein, Petitioner filed a Motion to Re-

lenges to Hall and Pilat, the Regional Director stated that the Petitioner withdrew its challenges to Donna Mosher and Jennifer Nedoroscik as the evidence establishes that they were employed in unit positions, and the parties agreed that challenged voters Jane Lantz and Lynne Mello worked in positions described in the unit and were eligible voters, and therefore Mosher, Nedoroscik, Lantz and Mello's ballots should be opened and counted. The parties further agreed with the Board's challenges to the ballots of Alan Wesson and Kathy Zack, as they were not eligible voters as described in the Agreement, and that Erin Keller was promoted to a position outside the bargaining unit, so she is also an ineligible voter. The challenged voters remaining at the commencement of the hearing are: Karla Aubin, Ife Bath, Brenda Bernard, Michelle Cormier, Linda Goding, Lisa Hall, Yvonne Jones, Elizabeth Lidonde, Melissa Marcucci, Roberta Ohman, Kim Pilat, Ellen Randall, Jose Rubio, and Michelle Zaleski. In addition, two of the Employer's Objections are really in the nature of challenged ballots. Employer's Objection 13 refers to voter Marcucci, who came to vote and was told that her name had already been checked off by the observers. After insisting that she had not previously voted, she was allowed to vote a challenged ballot. In addition, two ballots were declared to be void ballots because each one had the words "NO" written in both the "YES" and "NO" box. This is also Employer's Objection 16, but it will be discussed separately herein.

The Regional Director's Notice of Hearing concluded by ordering that a Report be prepared and served upon the Board resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues.

II. THE VOID BALLOTS

The Regional Director determined that two ballots, each with the words "NO" written in the "YES" and "NO" box of the ballots were void ballots. The Employer's Objection 16 challenges this determination. In *Horton Automatics*, 286 NLRB 1413 (1987), the ballot contained the word "NON" extending across both the "yes" and "no" box. The Regional Director found it to be a void ballot because it was unclear whether the voter intended to vote against the union or was rejecting voting entirely. The Board disagreed, saying that the ballot indicated that the voter's preference was clearly to vote against union representation. In *Pacific Grain Products, Inc*., 309 NLRB 690, at fn. 3 (1992), the Board stated: "We find that the Board agent erred by ruling a ballot void that was marked 'no' in both the 'Yes' and 'No' boxes. The Employer correctly maintains that such a ballot clearly indicates the voter's intent to cast a vote against the Petitioner." In *Wackenhut Corporation*, 666 F.2d 464, 467-468 (11th Cir. 1982), a situation identical to the present situation, the Court stated: "It would be within the Board's discretion to adopt a policy of rejecting any ballot not marked in precise conformity with its instructions... However, the Board has rejected such a rigid rule in favor of counting irregularly marked ballots whenever the intent of the voter is clearly apparent." [citations omitted] In conclusion, the Court stated: "The intent of the voter here is free from doubt. In response to a question 'Do you wish to be represented for purposes of collective bargaining...?' no clearer response could be given than to write 'no' twice on the ballot." I similarly find that the intent of these two ballots is clear, that the voters intended to vote against union representation. I therefore recommend that these two ballots be counted as "no" votes.

III. THE CHALLENGE BALLOTS

Melissa Marcucci was challenged by the Board agent because her name had already been checked off by both observers. Marcucci is employed by the Employer as an RIS assistant, an eligible category. She normally works from 1 p.m. to 9 p.m., but on the day of the election she worked the first shift, from 9 a.m. to 5 p.m., to cover for a fellow employee, Elaine Manzi. She testified that she arrived late for work that morning, at about 9:15 a.m., and the Employer's records show that she swiped her parking lot badge and entered the Employer's parking lot that morning at 9:12 a.m. She went to vote at the Medical Center at about 2:30 and was on line to vote between two other employees, Nancy Adams and Sharon Hutchison. She testified that after Hutchison voted, she was "...standing there for a couple of minutes and I said, Do you want my name? And they said, Yes. So I gave them my name." After giving her name, she was told that she had already voted that morning, that her name had been checked off by both observers, and she was shown the list where her name had previously been checked off. She testified that she had not previously voted and when she insisted on voting, she voted a challenged ballot.

Adams testified that she, Hutchison and Marcucci went to vote at the same time. Adams gave her name, was given a ballot and voted. When she came out of the voting booth, she heard Marcucci arguing with somebody who had told her that she had already voted, while Marcucci insisted that she hadn't previously voted, and she insisted on voting. When Adams asked her what the problem was, Marcucci told her, "Nancy, they're saying that I was here to vote. I wasn't here to vote." The Board agent then told Adams that since she had voted, she would have to leave, and she walked out of the voting area. Susan Thibeault was the Employer's observer at the Vernon Hills voting period from 11 a.m. to 1 p.m. She testified that during this voting period, approximately thirty employees voted. Although she is not familiar with Marcucci, and she cannot recollect all thirty names of employees who voted at that session: "I did not hear that name [Marcucci] announced."

In *Monfort, Inc*., 318 NLRB 209 (1995), which involved an election with a unit of approximately 1,500 voters, four voters who appeared at the polls to vote were told that they could not vote because their names had already been checked off the list, and, like Marcucci, they voted challenged ballots. The Board there sustained the challenges to these ballots, even though the hearing officer credited the four individuals that they had not previously voted, nor had they given their employee identification card to any one else. The Board sustained the challenges because the election ". . . was conducted in accordance with the Board's practice" [the observers from each side checked off the

consider and Amend Report on Challenged Ballots of Lisa Hall and Kim Pilat on the ground that after initially notifying the Regional Director that it would withdraw its challenges to Hall and Pilat, the Petitioner had discovered evidence that they possessed supervisory authority. The Regional Director granted this motion on May 4.

names of the voters], the voters "showed employee identification cards with their photographs and printed name to both observers" and "neither party attempted at the hearing to offer evidence that the names of these four voters were checked off the Excelsior list by mistake or inadvertence." The Board concluded:

> Under these circumstances, to overrule these challenges would have the effect of undermining the role of the observers in the election, as well as the Board's established procedures for the conduct of election. Because the observers for both parties agreed, by checking the four names off the Excelsior list, that these employees had previously voted in the election, we will not, on the basis of the affected employees' testimony alone, disturb this agreement.

There are a number of differences between the instant matter and Monfort. In the instant matter, the unit is about one-third the size of the Monfort unit, and the observers asked for the employees' Employer identification only if they did not know, or recognize the employees. In addition, in the instant matter the Employer in its objections, attacks the Board agents' alleged inattentiveness which objection, as will be discussed more fully below, I reject. I found Marcucci to be only a fairly credible witness, whose testimony was colored by her anger at the Board agents for making her vote a challenged ballot. For example, I find it highly unlikely that with four observers and two Board agents present she stood for a few minutes waiting to get a ballot, while nobody asked her for her name, as she testified. This testimony is further refuted by Adams' testimony that after she voted, she saw Marcucci arguing with the Board agent. Although I do not lightly disenfranchise an eligible voter, because I found Marcucci's testimony not entirely credible, I see no reason to vary from the principals enunciated in Monfort, and sustain the challenge to Marcucci's ballot.

Karla Aubin began her employment with the Employer in 1996 as a part time employee in patient care. She went on a leave of absence on February 20, 2000. By letter dated February 23, the Employer wrote her, inter alia:

> During an audit of employees on Leave of Absence placed on inactive status, I noticed that you were still listed in the Payroll System. You have been on leave of absence since February 23, 2000 and have not returned to work in any capacity. If my understanding is incorrect, please let me know as soon as possible.
>
> The maximum period for medical leave of absence is 12 months in any 12 month rolling period. In addition, our Workers' Compensation Third Party Administrator indicated that you have filed a claim for permanent and total disability. As such, your employment with St. Vincent Hospital will be considered to have voluntarily terminated effective today, February 23, 2004.

There is no record that Aubin responded to this letter. On the same day, the Employer completed a Personnel Change Form for Aubin stating that she was terminated effective February 23. As Aubin had not worked for the Employer for the four year period preceding the election, and was terminated by the Employer prior to the election for exceeding its 12 month leave of absence rule, I find that she was not an eligible voter and I sustain the challenge to her ballot.

Jose Rubio began his employment as a part time employee with the Employer in 2001 in the housekeeping department. Rubio began a medical leave of absence on July 3, 2002 and never returned to work. By letter dated February 23, the Employer wrote to Rubio:

> During an audit of employees on Leave of Absence placed on Inactive Status, I noticed that you were still listed in the Payroll System. You have been on leave of absence since July 3, 2002 and have not returned to work in any capacity. If my understanding is incorrect, please let me know as soon as possible.
>
> The maximum period for medical leave of absence is 12 months in any 12 month rolling period. In addition, our Workmen's' Compensation Third Party Administrator indicated that you filed a claim for benefits and were paid for a closed period from 7/30/02- 9/8/02. This agreement was reached in June of 2003 and your claim is currently closed. As such, your employment with St. Vincent Hospital will be voluntarily terminated effective today, February 23, 2004.

There is no record that Rubio responded to this letter. On the same day, the Employer completed a Personnel Change Form for Rubio, stating that his last day of employment was July 3, 2003, and that he was terminated effective February 23 for: "Failure to return from medical leave of absence. Claim closed." As Rubio had not worked for the Employer for a period in excess of eighteen months prior to the election, and was terminated by the Employer prior to the election, I find that he was not an eligible voter and sustain the challenge to his ballot.

In his brief, counsel for the Petitioner states that based upon the evidence presented at the hearing, he agrees that Rubio and Aubin were not eligible to vote as they had been terminated and had no reasonable expectation of returning to work within a reasonable time.

Elizabeth Lidonde was employed by the Employer as a unit secretary beginning in 1998. She was a per diem employee, meaning that she worked when she wanted to, but that she did not have budgeted, guaranteed or regularly scheduled hours. Pursuant to the eligibility requirements of the Agreement, the Employer compiled the hours that Lidonde worked for the two thirteen week periods preceding January 17. From July 20, 2003 through October 18, 2003, she worked 39.75 hours. For the period October 19, 2003 through January 17, 2004 she worked 31.25 hours. The last two days that she worked were November 14 and December 24, 2003. The Employer's payroll records, and Oscadal's testimony, establishes that she was a per diem employee. The Agreement provides that per diem employees must work a minimum of 120 hours in either of the two consecutive thirteen week periods prior to January 17 in order to be eligible to vote. As Lidonde did not satisfy these criteria, I sustain the challenge to her ballot.

Michelle Cormier was also a per diem employee. She was hired in January 2002 as a nursing float. The similar computations for Cormier establish that for the thirteen week period prior to October 18, 2003 she worked 83.75 hours and in the following thirteen week period ending on January 17, she

worked 98.25 hours. Her last days of employment prior to January 17 were January 2, 10, 13 and 15, each of which days she worked about eight hours. Because Cormier's hours do not satisfy the Agreement's criteria, I sustain the challenge to her ballot as well.

Michelle Zaleski, who had been employed by the Employer since 1995, was employed as a per diem patient care employee. During the thirteen week period prior to October 18, 2003 she worked 32 hours, and during the subsequent thirteen week period ending on January 17, she worked 31.75 hours, the last two days of which were January 9 and January 11. For the reasons stated above regarding Lidonde and Cormier, I sustain the challenge to her ballot.

In his brief, counsel for the Petitioner states that based upon the evidence produced at the hearing, Lidonde, Cormier and Zaleski were not eligible to vote as they were per diem employees who did not satisfy the requirements set forth in the Stipulation.

Brenda Bernard is employed by the Employer as a department secretary at its facility at 10 Washington Square in Worcester. She was challenged by the Petitioner because they believed that employees employed at the Employer's 10 Washington Square facility were not eligible to vote. The Agreement includes "unit secretaries," presumably her job classification, but refers only to the 20 Worcester Center Boulevard and the 25 Withrop Street addresses, not to 10 Washington Square. Martin Oscadal, the Employer's vice president of human resources, testified about the Employer's physical plant in Worcester. The Medical Center at 20 Worcester Center Boulevard houses a vast majority of the eligible employees. In addition, the Employer performs services, and has employees at 10 Washington Square and 20 Washington Square, which are across Bridge Street and are about 200 to 300 yards from the Medical Center. Vernon Hills, about two miles from the Medical Center, comprises two buildings about two hundred feet apart, which house a psych unit, an ambulatory clinic, radiation oncology, a purchasing department, and a warehouse with medical records. Certain employees in both of these buildings were eligible to vote in the election. All of these facilities operate under the same procedures and labor relations policies that Oscadal administers. He testified that there are between six and ten employees at 10 Washington Square, of whom the two clerical employees, including Bernard, were the only eligible voters. There was no testimony whether the other clerical employee at that location voted. He didn't believe that individuals employed at 20 Washington Square, the finance, payroll and accounting department employees, were eligible voters. The employees employed at 10 Washington Square park at a parking lot behind that building, or they can park in the Medical Center parking lot. Bernard's job requires her to spend some time at the Medical Center building. Further, Oscadal testified that he attended the two days of meetings that resulted in the Agreement. During these discussions, the Employer proposed that department secretaries at 10 and 20 Washington Square be included in the unit, "and there was discussion specifically about one position in the Information Systems Department that is located at 20 Washington Square and the union wanted that position excluded. We ultimately did agree to exclude that position."

Bernard was employed in a covered classification in a building across the street from the main building of the Medical Center. Her work sometime brought her into the main building and Oscadal's testimony appears to conclude that the parties agreed that eligible classifications employed at 10 Washington Square would be eligible. I therefore overrule the challenge to her ballot and recommend that her ballot be opened and counted.

Roberta Ohman has been employed by the Employer as an anesthesia technician, an included classification, for eighteen years. She is also a Licensed Practical Nurse, herein called LPN, a job classification specifically excluded by the Agreement. When she began working for the Employer, LPN licensing was a requirement for the job. Since that time, the Employer has not required anesthesia technicians to be licensed and when anesthesia technicians left, they were replaced by non-licensed employees so, at the present time, she is the only one of the five anesthesia technicians who is an LPN. She performs the same work as the other anesthesia technicians, except that as an LPN she is licensed to administer medication by injecting it into the intravenous bag while the patient is sleeping. Her identification badge states: "LPN Anesthesia." Her most recent job appraisal, dated March 9, lists her job title as Anesthesia Technician. Ohman is paid at the LPN rate of pay, which in about July 2003 was $20.26 an hour. Even though the Employer eliminated the need for LPN for this position after she was hired, they "grandfathered" her rate and classification, rather than reducing it.

The evidence establishes that Ohman is one of five anesthesia technicians (an eligible category) employed by the Employer at the Medical Center. She performs the same work as the other four, and the only difference between them is that as she is an LPN she can administer medicine, although the record does not establish how often she does so, and she is paid more than the other anesthesia technicians because of her LPN status. As she has a clear community of interest with the anesthesia technicians, with whom she, apparently, spends all of her work time, rather than with the Employer's LPN employees, I recommend that the challenge to her ballot be overruled and that her ballot be counted. *Columbia Broadcasting System, Inc*., 70 NLRB 1368, 1372 (1946).

Linda Goding has been employed by the Employer as a unit secretary since February 2001. During her initial period of employment, she worked a regular 24 hour a week schedule. In January 2003 she began a leave of absence that ended on December 15, 2003, when the Employer issued a Personnel Change Form for Goding stating that she was returning from a leave of absence and scheduling her for two eight hour shifts each week on the night shift, effective that day, which is what she requested. Her status code is listed as casual because the Employer classifies as casual all employees who are scheduled for one to thirty nine hours for a two week period. As it did with Cormier, Lidonde and Zaleski the Employer computed Goding's hours worked for the two thirteen week periods preceding January 17. For the first period she was on a leave of absence and did not work; for the second thirteen week period

she worked 50 hours, all between December 31, 2003 and January 17, although she testified that she began her 16 hour a week schedule on January 5. The Employer's payroll records state that for the three two week payroll periods beginning on January 17, Goding worked 19.25, 24.25, and 48 hours.

Although the Employer's status code for Goding is "casual," in Board terms, beginning on either December 31, 2003 or January 5, she returned to the Employer's employ as a regular part time employee working 16 hours (and subsequently 24) a week. The determination of Goding's eligibility therefore depends upon whether I employ the Board's terminology and find her eligible as a regular part-time employee by the eligibility date, or whether I employ the Employer's terminology of a "casual" employee, one working less than twenty hours a week and find her ineligible since she didn't satisfy the test set forth in the Agreement. Two cases cited by counsel for the Employer relate to this issue, *Inter Continental Hotels Corporation (Hawaii)*, 237 NLRB 906 (1978) and *National Public Radio, Inc.*, 328 NLRB 75 (1999). In these cases, the Board stated that when it can discern the parties' intent regarding the agreed upon bargaining unit, the Board will respect that intent as long as it is not contrary to any statutory provision or established Board policy. The eligibility provision contained in the Agreement refers to "per diem and casual employees" as also being eligible if they are in any of the included categories and satisfy the test set forth therein. Because per diem and casual are two of the Employer's established status codes, and the term "per diem" is not commonly used in Board matters, I find it likely that the parties' intent was to use those terms as the Employer, and its employees, understood them. As that would not contravene any established Board policy, I find that, as Goding was classified by the Employer as a casual employee, and as she did not satisfy the required number of hours test set forth in the Agreement, she is an ineligible voter, and I therefore recommend that the challenge to her ballot be sustained.

Ellen Randall was employed by the Employer as an office coordinator for the Neurology Department. She was challenged by the Petitioner. The only grounds stated was "not in unit." Her office coordinator position is an eligible position pursuant to the Agreement and the Petitioner has not proven otherwise. Further, she testified that the other office coordinators voted without challenge. I therefore recommend that the challenge to her ballot be overruled, and that her ballot be counted.

Yvonne Jones and **Ife Bath** were challenged by the Petitioner as supervisors. They are each housekeeping employees (an included classification) who also work as "supervisors" or "leadpersons" on alternate weekends, for which they receive an additional $2.00 an hour. The regular supervisor of the department is Linda Warren, who is employed on the first shift, Monday through Friday. There is no other "supervisor" present during the other shifts. The sign-in sheet states next to her name: "W/E Suprv," although Jones testified that she was never aware of this designation and none of the employees refer to her in that manner: "As far as I knew I was just called a lead person." Warren carries a beeper with the number 9372 during her shift; Jones and Bath carry it on the weekend first shifts. There are about fifteen housekeeping employees present on their shifts on the weekends. The other employees also carry beepers, but with a different number. At times, when Jones is very busy, she will give the 9372 beeper to another employee who was not as busy: "I needed to get the floor done so the nurses could have the room for the patients." The housekeeping employees, or anybody else, can contact her if they need assistance: "that's the known beeper throughout the hospital; if you need something you call the 9372 beeper...A light's out, a toilet needs to be cleaned, a floor needs to be swept, a bed needs to be moved; any number of things." On weekends they wear the same uniform as the other housekeeping employees: "I work everywhere, I can be scrubbing and waxing a floor...and then move down across the building...cleaning rooms; it's whatever they have for that day." When Warren leaves for the day, she gives this beeper to Linda Dulmaine, who is referred to as the second shift supervisor. On the third shift, any of the housekeeping employees can carry this beeper. It is this 9372 beeper that Jones and Bath carry on alternate weekends that caused the Petitioner to challenge them as supervisors. Jones and Bath have no other indicia of supervisory authority as set forth in Section 2(11) of the Act. Jones testified that when she receives a call that some work needs to be performed, she usually does the work herself: "If it's more than I can handle I'll call somebody and they'll come help me do it, but I do it for the most part." When she was asked if she was "assigning" the work to the employees, she testified:

> Oh no, I just call for help because that's just too much for me to do...I can get four calls in twenty minutes and somebody needs a bed over in 22 and somebody needs a bed in 36, I can't split those both up...so I'll just call Ed who's doing rubbish and he'll go push the bed for me so I can get the bed to the other side. Or I'll call, you know, whoever pops in my mind at the time I'll page.

Jones was asked if she was responsible for reporting employee misconduct on the alternate weekends when she has the beeper. She testified: "No, not really. If there's somebody out of line and I'm called from a nurse on the floor, I have to go and call my supervisor [Warren] or Fran Spasaro [the manager] or Glen Forcier [the director of housekeeping] and then they deal with the situation." She does not make any recommendations: "No, I just report what happened and they decide what they're going to do." If an employee calls in sick while Jones is present on the weekend, Jones calls Forcier, Spasaro or Warren to find out what she should do, and they will make the decision and call other people to come in to work. In addition, "I usually do the work. I take it on top of whatever I'm doing that day." If an employee asks her if he/she can leave early, Jones meets them in the supply room and calls Spasaro.

Bath testified that she is a housekeeper and has been a weekend team leader for two years: "I'm not a team lead every weekend. Every other weekend I'm a [team lead]. The weekend in between I'm just a housekeeper." For the weekend team leader work, she is paid $12.60 an hour, including the additional $2.00. On the weekends, when Warren is not present, she " would delegate whatever was left for them." Certain of the housekeepers have designated areas to cover. For the others, Warren writes their assignments, leaves them in a box, and

Bath gives them to the employees. She carries the 9372 beeper on alternate weekends. When she experiences situations involving employee misconduct on a weekend shift, she speaks to all those involved in the incident, writes down what they say, and gives the report to Warren or Forcier, without a recommendation. If the situation demands immediate action, she calls Warren or Spasaro to find out what they wanted her to do. If she is told that a housekeeping employee is not properly performing his/her work, Bath calls either Warren or Spasaro, "and ask them what they want done about it." Bath testified that about two years ago, a secretary beeped her and told her that a housekeeping employee was involved in a heated argument with a patient's daughter. She went to the third floor and saw the housekeeping employee pacing the floor and cursing that nobody could tell her how to do her job. Bath asked her to come into an empty room with her to calm down, but she was unsuccessful in getting her to calm down. When Bath saw the patient's daughter approaching, she asked the housekeeper to come downstairs with her, in order to avoid an altercation between the two. Bath then called Spasaro, told him what happened, and Spasaro told her to send the employee home, which she did.

Sonia Rodriguez, who has been employed by the Employer for five years as a CNA, testified that a few weeks before the election, she asked Bath if she was going to vote in the Board election, and she said that she wasn't eligible because she had been promoted to supervisor.

It has long been accepted Board law that the burden of proving supervisory status rests on the party asserting that such status exists. *Freeman Decorating Co.*, 330 NLRB 1143 (2000), citing *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). Further, the party asserting such status must establish it by a preponderance of the evidence. *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999); *Dean & Deluca New York, Inc.*, 338 NLRB No. 159. In attempting to establish the supervisory status of Jones and Bath, the Petitioner relies solely upon their ability to "assign" employees to specific jobs on the weekends after learning through their 9372 beeper that an housekeeping employee was needed somewhere in the hospital to perform some work. Section 2(11) of the Act, in spelling out the criteria of supervisory status, including "assign...or responsibly direct them" contains an important caveat: "...if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Further, an employee who substitutes for a supervisor is considered to be a supervisor within the meaning of the Act "only if the individual's exercise of supervisory authority is both regular and substantial." *Hexacomb Corporation*, 313 NLRB 983, 984 (1994).

The dividing line between a supervisory employee and a trusted and experienced employee is often difficult to discern. In *NLRB v. Grancare, Inc.*, 170 F.3d 662, 667 (7th Cir. 1999), the Court stated:

> The concept of "independent judgment" under Section 2(11) is, at its core, concerned with those who work at the margins of supervisory authority. The Board must draw a line separating the lowest level of true supervisors- those who are part of management's team- from those valuable employees who are just on the other side of the line. Those just on the other side of the line are employees who exercise some authority but not enough to be considered more than part of the regular work force.

The credible testimony of Jones and Bath establishes that the weekend assignments are prepared by Warren; however Bath and Jones also receive messages on the 9372 beeper that a housekeeping employee is needed to clean a room, a bathroom, or move a bed. On those occasions, they perform the work themselves or call whoever is nearest to the area involved, or is the most obvious person to perform the work. In language that would be appropriate for the instant matter, the Board in *Carlisle Engineered Products, Inc.*, 330 NLRB 1359 (2000), in finding that the challenged classification, processors, did not exercise independent judgment in the assignment of work, stated: "the processors' exercise of this authority to assign work is simply based on commonsense efficiency and job priorities set by the Employer. We find that their assignment of work on this basis is routine and insufficient to establish supervisory status." Similarly, in *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1265 (11th Cir. 1999), the Court stated: "for an assignment function to involve independent judgment, the putative supervisor must select employees to perform specific tasks on the basis of a judgment about the individual employee's skills." In *Visiting Nurses Services of Health Midwest*, 338 NLRB No. 113 at p. 3 (2003), the employer challenged IV clinical coordinator O'Roark as a supervisor because she assigned patients needing IV therapy to the field nurses. The administrative law judge stated:

> The Employer failed to demonstrate that O'Roark's assignment of case managers is anything other than routine in nature. I cannot conclude that she actually exercises independent judgment in making this assignment. Given the Employer's daily average patient load of 900, someone must direct traffic. And such is O'Roark's principal function but making these assignments is essentially routine.

I find that the assignments that Jones and Bath make on alternate weekends are routine in nature and do not require the use of independent judgment. As they are not supervisors within the meaning of the Act, I recommend that the challenges to their ballots be overruled, and that their ballots be counted.

Kim Pilat and **Lisa Hall** are employed as office coordinators in the nursing office, an eligible classification. They were challenged by the Petitioner as supervisors and Pilat testified pursuant to a subpoena from the Petitioner. She has been employed by the Employer for nineteen years and works four weekdays, 7 a.m. to 4 p.m. Hall also works weekdays, so that one or both of them are present on the day shift during the week; there is no weekend coverage. Their supervisor is Donna Lacaba, the director of nursing. Pilat testified that she and Hall do the scheduling for thirty seven PCAs (personal care assistants) and secretaries, two LPNs and thirty RNs, as well as staff reports and typing. As for scheduling:

> Well half of these employees are per diem. That means they work when they want to work and the other half are budgeted.

> That means they are guaranteed a certain amount of hours each week based on their budgeted hours. The budgeted ones work every other weekend and every other holiday and the per diem basically call us and tell us when they want to work.

If they need additional employees, they can ask the per diems to work additional hours, they can call agencies that they use, or they can ask the regular employees to work additional hours. If overtime is needed, in determining who gets overtime hours:

> Well, what we usually do is we can go back and look at their payroll and see how many hours they have done for the week already. I have all the floors' master schedules. I can actually look and see how many hours they are scheduled for that week. We try to go by who signed up first because one of us is there every day and we usually know who calls. Then we try to do it fairly, but that's basically how we do it.

In addition, in deciding who is scheduled for overtime hours, which are voluntary, they look to who has worked the most hours already for that week. She and Hall prepare and post the work schedules every four weeks based upon the formula in the staffing guidelines: "So, if there are 18 patients we know we need three nurses and two PCAs." The Employer has a master staffing sheet and the managers fill in the sheet with their staff and if there is going to be a vacancy, or "a hole" as described by Pilat, the manager draws a line through that position, so that Pilat and Hall know what positions need to be filled, and it is their responsibility to decide who gets the assignments. In making this decision, the initial assignments go to employees who would not be on overtime. As for the per diems:

> They actually schedule what they want to work for the month. They will call weekly or daily. They could call an hour before the shift and actually say, do you need me for 7:00 to 3:00 or 3:00 to 11:00. There is no set time that they have to call by.

If an employee calls shortly before a scheduled shift to say that he/she is unable to work that shift, they call somebody else to cover the shift. If a "float" notifies her that he/she has to leave work early, Pilat and Hall try to find somebody to cover for the position. However, "if they have already said that they were leaving, we can't make them stay." If she and Hall are unable to cover the "holes" in the schedule, they need Lacaba's approval before calling an agency for coverage.

Linda Wall, a secretary in the Employer's same day surgery department, testified that when she wanted overtime work, she called either Pilat or Hall and they notified her if she had overtime work and, if so, when, although she does not know who actually decided on the assignments or what criteria were considered. Tammy Ceccarini, who is employed by the Employer as a 24 hour flex PCA, testified that when she wanted overtime, she called the nursing office, told them of her availability and, a majority of the time, she was given overtime work. Marie Audate, employed by the Employer for five years as a PCA, testified that she works a regular forty hour shift, but when she wants overtime work, she calls Pilat or Hall and tells them of her availability, and usually gets the work. Oscadal identified two job appraisals given to Pilat, one dated January 2003 and one March 2004, both of which were received in evidence. Because there are some differences is the "Position Purpose" referred to in these appraisals, I have used the earlier one prepared prior to the election. Under Position Purpose, it states:

> Under minimal supervision, provides nurse managers scheduling and staffing support of varying degrees of complexity. Assigns float staff as required by supplemental staffing requests, staff competency and staff available. Adjusts float schedules daily as dictated by staffing needs, competency level required, and staffing guidelines.

Under Reporting Relationships and Level of Autonomy, the appraisal states:

> Generally establishes own work plans and priorities to assure timely completion of assigned work in conformance with established policies and standards. Issues lacking clear precedent are reviewed with supervisor prior to taking action. Reports directly to the Administrative Manager, Nursing Office.

At the time of the election Pilat's hourly rate was $17.21.

I find that the Petitioner has failed to satisfy its burden of establishing that Pilat and Hall are supervisors within the meaning of the Act. I make this finding for a number of reasons. Initially, I note that their job classification, office coordinator, is an eligible category pursuant to the Agreement. In addition, I find that there is a difference between "assign" as stated in Section 2(11) of the Act and the work that is performed by Pilat and Hall, scheduling, which, in their case, does not require the exercise of independent judgment because it is performed within established parameters. In Dean & Deluca New York, Inc., supra, at fn. 15, the Board stated: "An individual's direction and scheduling of employees does not necessarily establish that the individual is a statutory supervisor." *Quadrex Environmental Company, Inc.*, 308 NLRB 101 (1992), involved the supervisory status of "leads." The Board stated:

> With respect to making assignments, the leads follow a detailed project plan that has been put together by management. That plan provides a performance schedule and the leads assign employees according to staffing needs that have already been set by management to provide the skills needed for the job...Under such circumstances, employees lack sufficient discretion to be statutory supervisors. The Board has previously noted that when employees have special skills and management prepares a master schedule based on those skills, assignment of daily jobs amounts merely to routine implementation of orders.

I therefore recommend that the challenges to the ballots of Pilat and Hall be overruled, and that their ballots be counted.

In conclusion, I recommend that the challenges to the ballots of Marcucci, Aubin, Rubio, Lidonde, Cormier, Zaleski and Goding be sustained, and that the challenges to the ballots of Bernard, Ohman, Randall, Jones, Bath, Pilat and Hall be overruled, and their ballots be opened and counted.

IV. THE OBJECTIONS

1. The Petitioner harassed, coerced and intimidated eligible employees, including escorting and/or accompanying eligible voters to the polling place, entering and remaining in the voting area to watch the employees voting and signaling to the Union's observers to challenge the vote of certain employees.

As there is no evidence to support this objection, I recommend that it be overruled.

2. The Petitioner promised and/or provided benefits, gifts, and other items of value to eligible voters in order to influence them to vote for the Union.

Karen Baker, who is employed by the Employer as a unit secretary/PCA, an eligible classification, also served as the Petitioner's observer at the final voting period at the election. She voted during the first voting period, at about 6:15 a.m. At about 2:00, on the day of the election, she saw Kathleen Keller, an international organizer for the Petitioner's international union, Region 1, who was wearing a jacket with the union name on it. Baker told Keller that she liked the jacket and it had her daughter's school colors. She told Keller: "I want your coat" and Keller gave her the jacket, and she wore it for the last half hour of her shift that day, but not while she was acting as an observer at the election.

This objection clearly has no merit. It involves a used jacket being given to one of the Petitioner's observers, at her request. An election will be overturned when the misconduct of the union or its agents "reasonably tends to interfere with the employees' free and uncoerced choice in the election" based upon objective facts. *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 285 (6th Cir. 1998). This was an impromptu gift given to Baker, at her request, without any promises of support for the Petitioner required. It wasn't necessary because she was an observer for the Petitioner and, presumably, already supported the Petitioner. I therefore recommend that this objection be overruled.

3. The Petitioner threatened employees that, among other things, they would be terminated, outsourced or would otherwise lose their jobs if the Petitioner lost the election.

As there is no evidence to support this objection, I recommend that it be overruled.

4. The Petitioner engaged in objectionable conduct by discriminatorily challenging the votes of employees solely upon its belief that the voters supported the Employer in the election.

The Employer, in its brief, states that: "...it is clear that the Union was engaged in a plan to systematically exclude those employees that had expressed a lack of support for the Union...the Union's use of discriminatory challenges establishes grounds for setting aside this election." Approximately 485 employees were eligible to vote in the election; 446 actually voted. Of these twenty one were challenged, ten by the Petitioner, eight by the Board, and three by the Employer. After the challenges were "vetted" by the Region, fourteen challenges remained, six by the Petitioner, six by the Board and two by the Employer. As can be seen by the discussion, supra, the only "weak" challenge was the challenge of Randall. The challenges to the ballots of Jones and Bath, and Pilat and Hall and Bernard were certainly arguable even though I have overruled them and ordered that the ballots be opened and counted. Out of a unit of almost five hundred employees, ten challenges is not an excessive number of challenges, nor is there any evidence that any of the Petitioner's challenges were in bad faith, or was somehow meant to coerce the other voters. I therefore recommend that this objection be overruled.

5. The Petitioner offered to waive initiation fees for employees who signed authorization cards for the Petitioner, "thereby buying endorsements and/or painting a false picture of employee support for the Union."

Krystal Kupfer, who is employed by the Employer as a PCA, attended a meeting held by the Petitioner in about early January. She testified that at this meeting, Keller told the employees that since they were already employed by the Employer, they would not have to pay an initiation fee if the Petitioner won the election, but future employees would have to pay the fee. Keller testified that she told the Employer's employers: "...those of you who are here...this group of eligible voters, you won't pay an initiation fee."

Keller impressed me as a savvy, bright woman who was knowledgeable about the law on relevant subjects (such as the waiver of initiation fees) and knew that any misstep would be memorialized in objections. Her statements herein were clearly permissible. *De Jana Industries, Inc.*, 305 NLRB 294 (1991). In *NLRB v. VSA, Inc.*, 24 F.3d 588, 593 (4th Cir. 1994), the Court discussed the Supreme Court's decision in *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270 (1973), the lead case on this subject:

> Thus, the linchpin of Savair is the linkage between the offer to waive the initiation fee and a pre-election commitment to support the union. It is this linkage that constitutes the union's impermissible interference in the election, and allows the union "to buy endorsements and paint a false portrait" of employee sentiment. id at 277...No such impermissible interference by the union occurred here. Unlike Savair...the offer to waive initiation fees here was not conditioned on a pre-election commitment to support or vote for the Union. On the contrary, everyone qualified for the waiver if the Union won the election, even those who opposed the Union.

I recommend that this objection be overruled.

6. During the election the Board agents allowed the Petitioner's observers to engage in prolonged conversations with voters waiting to cast ballots. These conversations took place in the polling area and constituted campaigning by the Petitioner's observers.

Yvonne Jones, who was an observer for the Employer during the first voting period, testified that the communications between voters and the Petitioner's observers were limited to comments about the weather and " there were a few people that had asked them to give them a call." Ellen Randall testified that one voter gave a piece of paper to the Union observer, which she presumed contained her telephone number, and said, Let me know how things are going." Susan Thibeault, who was an observer for the Employer at the Vernon Hills voting, testified that during the voting period, the Union observers were talking about families, and she participated in these discussions. She did not testify whether voters were present during these discussions. Joan Brytowski, who was an observer for the Employer at the 2:00 to 5:00 and the 10 p.m. to midnight voting periods testified that at a pre-election conference the Board agents instructed the observers that if they recognized the voter, they should limit any discussions to hello, or a casual greeting, but nothing else. During the election, there was "light" or "casual"

conversation among all of the observers, but not about the election. She testified to a situation where a voter:

> got into quite a detailed conversation with one of the union representatives and kept asking well how do you think it's going and didn't get an answer but then she had suggested that if she asked a question that they could answer with a yes or no. So they asked if they thought it was going to rain or some type of question like that some kind of irrelevant question...at some point the Board member said she's no allowed to answer that and then they said if you voted to please leave the room.

Linda Wall was an observer for the Union at the first and second voting periods. She testified that at the pre-election meetings the Board agents told the observers that they could say hello or good morning to the voters, but that they were not to carry on any conversation. During the voting periods, when there were no voters in the area, the observers engaged in general conversation. Wieslawa Miller, a Union observer at the morning and afternoon voting period at the Medical Center, testified that the only conversations with voters was, "Hi, how are you? That's it. There was no other conversation." Diane Crawford, a Union observer at the afternoon session at the Medical Center, testified that the Board agents told them that normal conversations were fine, just no talking about the vote. During the voting Sonia Rodriguez, a voter, asked her about her son, who has a "medical situation." She told Crawford to call her, but Rodriguez said that she didn't have her telephone number, and Crawford gave Rodriguez a piece of paper with her telephone number.

Even if I were to credit the Employer's witnesses and disregard the Union's witnesses' testimony, as the conversations here were isolated comments or inquiries, and were being monitored by the Board agents, I recommend that this objection be overruled. *Michem, Inc*., 170 NLRB 362 (1968).

7. The Union used envelopes and postage meter stamps of the Employer to mail Union literature to eligible voters, thereby creating the false impression that the Employer supported the Union and creating the false impression that it was futile to vote.

Shadrack Bryan, who is employed by the Employer as a housekeeper at the Medical Center, an eligible classification, testified that prior to the election he received a letter with the Employer's return address on the envelope. The postage meter stamp lists Worcester, Massachusetts, and the cancellation stamp states "Central Massachusetts" with a date of February 25." Inside this envelope was a letter dated February 21, 2004 addressed "Dear St. Vincent Co-worker" stating:

> In anticipation of winning our union election on Friday, February 27th, we have enclosed a contract proposal questionnaire for each of you to fill out and mail back. Your reply will help us fight hardest for the things we all want most.

Enclosed was a questionnaire and a self addressed stamped envelope with the Union's address. Bryan doesn't know who mailed it to him, but after receiving it he reported it to his supervisor. Emily Hardt, an organizer for Region 1 of the International, testified that on about February 21 the Union mailed out the contract proposal questionnaires to the eligible voters, in Union envelopes with the Union's postage meter from their office in Dedham, Massachusetts. The Union never used the Employer's envelopes for any of its mailings, although she did not personally place the questionnaires in the envelopes. Douglas Belanger, vice president and director of organizing for the Union, testified that the Union never mailed any literature to eligible voters in the Employer's envelopes. He assisted in the contract proposal questionnaire that was sent to eligible voters; he participated in drafting the letter and ran some of the letters through the Union's postage meter. It was mailed about a week prior to the election. The Union's postage meter states their principal office, Dedham, and has the Union's postage meter number, which is different than the postage meter number on the envelope that Bryan received.

There is no evidence supporting the allegation that the Union mailed the letter in question to Bryan. I can see no reason why they would do so and note that the post mark on the letter is February 25. I find it highly unlikely that a union would send a letter to employees that had to be received on the following day in order be effective. Further, there is no evidence that Bryan, apparently the only employee who received such a letter, was deceived by the letter or had any reason to believe that it was actually from the Employer. Obviously he was not deceived, because he immediately showed it to his supervisor. I therefore recommend that this objection be overruled.

8. The Union used photographs of the Employer's employees in their campaign literature without their permission.

Kupfer, who has been employed by the Employer for three years as a PCA, testified that in early January she and fellow employee Nichole Hart went to a Union meeting at the Hampton Inn near the Medical Center. She went to the meeting to find out what it was all about. At this meeting a representative of the Union, apparently Keller, spoke about the benefits that the Union could get for them and what the Employer was doing to convince them to vote against the Union, although by the conclusion of the meeting she had not yet made a decision on how she would vote in the election: "At the end when we were on our way out the door, they said we're going to take a picture. This is for a collage for the campaign after the election, that shows everyone that went to the meetings." They were not instructed on how to pose for the picture, and they were not told who the picture would be given to or whether it would be used for any other purpose. She and Hart agreed to pose for the picture: "I didn't see any harm in it." On about February 24 or 25, she received a call at home from Hart, who was at work, saying, "You'll never guess what's going on." Hart told her that the Union had distributed glossy leaflets all over the hospital containing pictures of twenty five employees, including Kupfer and Hart, all with their hands out and thumbs up. It states: "We deserve the same respect and care as we give our patients. Join us in voting YES for a better future." The picture of Kupfer and Hart was the one taken at the Union meeting in early January. Kupfer testified that she was angry because, "I didn't give permission for my picture to be used as this...And, coming out like this and saying I'm voting yes, then, I have a problem with that." On cross examination she was asked:

> Q but you didn't express any objection to having your picture taken for use in a collage after the election.
>
> A No. I didn't think it was going to be used. I thought it was going to be used for a collage, not for a brochure saying that I'm voting yes.

When she got to work that day she received mixed reactions to the pictures from other employees, some were for it, some were against.

Hart likewise testified that at the conclusion of the Union meeting she and Kupfer were asked to be in a Union picture: "It was to be used as a collage, something that was to be used if the Union won at the end of the election...I wasn't told it was going to be used as a campaign flyer." On that basis they agreed to have their pictures taken. On February 24 or 25, when she saw the Union leaflet, she and Kupfer told their supervisor of what happened. They also prepared a response to the leaflet that stated:

> TO ALL UNION ELIGIBLE VOTERS:
>
> THIS IS TO SHARE WITH YOU OUR PERSONAL EXPERIENCE. AS WE CAME TO WORK TODAY . . . IMAGINE OUR SURPRISE AS WE PUNCHED IN AND NOTICED OUR PICTURES IN A UNION FLYER HANGING ON THE PUNCH CLOCK. THROUGHOUT THE DAY THE FLYERS WERE FOUND IN BREAKROOMS, PASSED TO EMPLOYEES AND EVEN UP ON ELEVATOR DOORS AND WALLS. THESE FLYERS WERE WHERE EVERYONE, INCLUDING VISITORS, COULD BE SEEN.
>
> WE FEEL THAT WE HAVE BEEN EXPLOITED. VOTING IS SUPPOSED TO BE ANONYMOUS AND THIS WAS DEFINITELY AN INVASION OF OUR PRIVACY. THESE PICTURES WERE TAKEN UNDER FALSE PRETENSES. WE WERE LIED TO AS TO WHAT THE PICTURES WERE GOING TO BE USED FOR. SOME COLLAGE, HUH?
>
> WE ADMIT WE WENT TO THE UFCW INFORMATIONAL MEETING, BUT IT WAS TO GATHER AS MUCH INFORMATION AS POSSIBLE CONCERNING THE UPCOMING ELECTION. WE WENT TO HEAR WHAT THE UNION WAS OFFERING AND TO BECOME EDUCATED ABOUT OUR VOTING CHOICES.
>
> OUR FEELINGS ARE VERY HURT AND THIS HAS CHANGED THE WAY WE VIEW THE UFCW UNION. THE ONLY THING THE UFCW HAS BROUGHT TO US IS FRUSTRATION, EMBARRASSMENT AND DISAPPOINTMENT. WE ENCOURAGE ALL VOTERS TO BEWARE OF THE UFCW'S UNETHICAL BEHAVIOR. PLEASE VOTE NO.

Kupfer and Hart made ten copies of this notice without signing it or putting their names on it, and placed them in the same locations where the Union's leaflets were placed. Others, unknown, made additional copies of this notice and distributed them throughout the hospital so that eventually there were about an equal number of these notices as there were Union leaflets.

Keller testified that the picture of Kupfer and Hart was taken on February 10 at a regular Union meeting at the Hampton Inn. The purpose of the meeting was to answer any questions that Kupfer, Hart and one other employee had: "toward the end of the meeting...they said that this sounded like something that they were very interested in..." Keller then told them:

> . . . what we're doing is we're trying to put together like a showcase flyer, meaning, you know, people that are supporting the Union, take their pictures, make it into a flyer, like a collage, and then distribute it to your other co-workers inside the hospital before the election, as a show of union support, are you interested?
>
> All three of them, Kathy, Crystal and Nicole said yes. I said, well, the others are getting together, putting their thumbs up and saying union yes, as we snap the picture. And that's what they did.

She gave the same explanation to all the other employees whose picture was taken for the leaflet. Hardt, the Union organizer, testified that although she did not take the picture of Kupfer and Hart, she took pictures of ten to fifteen other employees and asked each one if she could take their picture for a Union flyer to be distributed at the hospital before the election expressing their support for the Union.

There is a clear credibility issue of what Kupfer and Hart were told by Keller as to the purpose of the picture being taken. While they testified that Keller told them that it was for a collage to be used after the election, if the Union won the election, Keller testified that she told them that the flyer was a collage that would be distributed prior to the election to show their support for the Union. Although Kupfer, Hart and Keller appeared to be equally credible witnesses, as there is a clear difference in their testimony, I credit Keller's testimony as the most reasonable under the circumstances. The situation occurred at a Union meeting. It is reasonable to assume that the Union wanted to display as many employees as possible who was interested in the Union in order to possibly influence other employees. Whether the Union won or lost the election the pictures would serve no valid purpose after the election. I find it likely that Kupfer and Hart, two young women with no prior union experience, were "caught in the moment" of the Union meeting and, without fully thinking it through, agreed to have their picture taken, without any limitations. I therefore credit Keller's testimony and find that she told Kupfer and Hart that the picture would be used prior to the election. However, even if I credited Kupfer and Hart I would still come to the same conclusion. I believe that this objection should be analyzed under the principals in misrepresentation cases set forth in *Hollywood Ceramics Co.*, 140 NLRB 221 (1962). In the instant matter only two of the twenty five photographed employees claimed to have been misled, not a "substantial departure from the truth," Hollywood Ceramics, supra, at 224. In addition, the leaflet was distributed two to three days prior to the election, and Kupfer and Hart (as well as others) distributed their rebuttal throughout the hospital on the same day in about equal numbers. So, even if there had been a misrepresentation, it was "amply rebutted." *NLRB v. Utell International, Inc.*, 750 F.2d 177, 180 (2d Cir. 1984). I therefore recommend that Objection 8 be overruled.

9. During the election the Board agents allowed the Union's observers to place telephone calls from the voting area while the polls were open, and allowed the Union observers to leave the polling area for an undetermined period of time while wear-

ing their union observer badges and without being accompanied by an Employer observer.

Brytowski, who was an Employer observer at the 2:00 to 5:00 and 10:00 to midnight voting periods at the Medical Center, testified that there was a telephone in the back of the room where the voting took place and on two occasions the Union observer used the telephone. Prior to making the call, the observer told the Board agent that she was going to call home, and the Board agent told her that as long as she called home, she could use the phone. In addition, on one occasion, the Union observer left the voting area by herself and went to the bathroom while still wearing her observer badge and a Union pin. Brytowski could see her talking to some people, including Fradine John Baptiste, a PCA employed by the Employer, although she could not hear what was said. Linda Wall, who was a Union observer at the first session at the Medical Center and the next session at Vernon Hills, testified that none of the observers used the telephone at the first voting session at the Medical Center, but toward the end of that session, while no voters were present to vote, Miller, the other Union observer, asked the Board agent for permission to go to the bathroom and after receiving permission, she went to the bathroom, leaving her observer badge on the table when she left. Miller, who was the Union observer at the 6:00 to 9:00 a.m. and the 2:00 to 5:00 sessions at the Medical Center, testified that during the first voting session she received permission from the Board agent to go to the bathroom at a time when there were no voters in the area. The Board agent told her not to talk to anybody while she was out of the room. She left her observer badge on the table when she left, and did not talk to anybody while she was gone. During the afternoon voting session Crawford received a telephone call on her cell phone from her fiancé involving keys to a car; no voters were in the area at the time. Baker, who was a Union observer along with Tammy Ceccarini at the 10:00 to midnight voting session, testified that none of the observers left the voting area during this session, but Yvonne Jones, one of the Employer's observers, got beeped and went to the corner of the room and used the telephone to make a call, after receiving permission from the Board agent to do so. Ceccarini testified that she was the only observer who used the phone during that final session; she called her home during the voting period to check on whether her children were home, with permission of the Board agent, while no voters were present. In addition, with about ten minutes left in the session, with permission of the Board agent, she went to the bathroom and when she returned, the Employer's observer went to the bathroom. Crawford, who was the Union observer for the afternoon session at the Medical Center, testified that she had her cell phone with her because of her son's medical condition. At a time when no voters were present, she received a call from her fiancé saying that she had taken his keys and he couldn't get into the house.

The evidence establishes that during the four voting periods, observers from both sides briefly left the voting area, with permission of the Board agent, to go to the bathroom and observers from both sides received or made brief telephone calls in the voting area, also with permission of the Board agent. As the Union and the Employer each had two observers at all of the voting sessions, even on those few occasions when one of the observers was out of the room or on the telephone, the other observer was present to watch the ballot box and to check on the eligibility of employees coming to vote. There is absolutely no evidence that these telephone calls or brief bathroom absences had any effect on the integrity of this election process. I therefore recommend that this objection be overruled.

10. During the election, the Union harassed, coerced and threatened employees it believed supported the Employer by escorting employees to the voting area, remaining in the voting area and watching employees vote.

Yvonne Jones, who was an observer for the Employer on the first shift at the Medical Center, testified that on one occasion during this voting period, an employee who already voted brought another employee into the voting area and remained in the voting area on the opposite side of the room as the voter, and did not leave until the voter left. As this single incident had no effect upon the fairness and validity of the election, I recommend that this objection be overruled.

11 and 12. The Board agents failed to verify the identification of voters despite the fact that the Employer issues its employees picture identification badges, and this failure tainted the election process making a fair election impossible.

The testimony regarding this objection often involves a "he said/she said" situation, with somewhat different testimony from the Employer's witnesses as from the Union's witnesses although all witnesses agree that the Employer issues its employees photo identification badges.

Employer witnesses: Jones testified that prior to the election she received a flyer from the Employer and was told by her manager to bring her picture identification with her to the election, but the Board agent conducting the election told her and the other observers that, "if somebody didn't have an I.D. badge she told them just to state their name, that that would be fine." She testified that more than fifteen voters came to vote without their IDs during her voting session. Nancy Adams testified that she always wears the Employer's identification badge around her neck, and wore it when she went to vote in the election. However, nobody asked to see it when she voted, although they could see it as she went to the table to get her ballot. She didn't know any of the observers, although she had seen them in the hospital and recognized them as employees. Thibeault testified that the procedure was that employees came to the table, one of the observers asked them their name, the observers checked their names on the eligibility list, and they were given a ballot. Brytowski testified that prior to the opening of the polls, the Board agents told the observers that, "IDs would not be required" but that they "could check Ids if we were more comfortable with that but no one would be turned away if they did not have an ID." During the two periods that she was an observer, about four employees did not have their Employer identification badges. When the election began, Brytowski asked all voters to see their identification badges, even if she knew them. Subsequently, one of the Board agents said: "We're not asking for IDs." Oscadal testified that at the pre-election conferences, there was no discussion of requiring voters to have their Employer identification badge in order to vote.

Petitioner's witnesses: Linda Wall, a Union observer at the first and second voting session, testified that prior to the first

voting period there was a meeting with the observers and the representatives of the Employer and the Petitioner. At this meeting, one of the Board agents told the observers, "If you don't know somebody...ask them for an ID." She recognized most of the employees coming to vote. Miller, a Union observer at the morning and afternoon session at the Medical Center, testified that the Board agent told them that if they recognize the voter, they should just check off their name. Baker, a Union observer at the final voting session, testified that the Board agent told them, "...if we didn't recognize somebody, to ask them for their identification. But everybody basically showed us their badge, because that's what they were told to do." Crawford, a Union observer at the afternoon session at the Medical Center, testified that the Board agents told the observers that if they didn't know the voters, they could ask to see their IDs. Hardt testified that at the pre-election conference on February 27, there was no discussion between the Employer's representatives and the Union representatives regarding the use of ID badges at the election, but the Board agents told the observers that they could ask to see the voter's ID if they wanted to. Ceccarini, a Union observer at the final voting session, testified that at the beginning of the voting period the Board agent told the observers, "that if we had any questions of who someone was that we could ask for their badge at that time." She did not ask to see voter's badges because, "I didn't feel the need to...I've been there many years and know many employees by face." Lisa Hall, the Employer's observer, asked to see a couple of employees' badges.

I find that this objection has no merit for a number of reasons. The Employer and the Union each had two observers at each of the voting periods. These observers were told that they could request to see employees' IDs if they did not know the employee. There was no prohibition by the Board agents on requesting IDs, they left it to the discretion of the observers. In addition, the Employer had instructed its employees prior to the election to have their ID with them. Therefore, a vast majority of the employees came to the voting table with their ID hanging from their neck. The observers were able to see these IDs, even if they didn't formally ask to see them. Finally, at no time prior to the election, or even before the final voting session, did the Employer's representatives request the Board agents to demand that each voter show his/her Employer ID prior to voting. Other than the situation involving Marcucci, there is no evidence that any employee was disenfranchised by the Board's agent's instructions to the observers.

Avondale Industries, Inc. v. NLRB, 180 F.3d 633, 637 (5th Cir. 1999), cited by both counsel for the Employer and counsel for the Union in their briefs, involved an election with almost 4,000 voters, over eight times as large as the instant election, where the employer objected that the Board refused to enforce any system of routine voter identification beyond voluntary self-identification. In vacating and remanding the case, the Court stated:

> When examining the voter identification procedures employed in a representation election, this court does not sit to determine "whether optimum practices were followed, but whether on all the facts the manner in which the election was held raises a reasonable doubt as to its validity...Even under this deferential standard, however, reasonable doubt means "reasonable uncertainty," not "disbelief" or "conclusive proof"...Voter identification procedures appropriate for representation elections in small units may be inadequate when the eligible voting pool becomes very large. As the NLRB Case-handling Manual suggests, "[Voters] may also be asked for other identifying information as *appropriate* and as formerly agreed on." [emphasis added]

I find that the voting procedure employed was a fair and appropriate one and recommend that this objection be overruled.

13 and 14. These objections involve the challenge to Marcucci's ballot discussed under the Challenge section herein, as well as the discussion above regarding Objections 11 and 12.

15. During the election the Board agents failed to maintain the integrity of the voting area and were inattentive to the conduct in the following ways: by leaving the polling area during the voting periods, by reading a newspaper and programming a cellular phone during the voting periods. Again, there are some differences in the testimony as between the Employer and the Union's witnesses.

Jones testified that both of the Board agents were trying to figure out how to program a cell phone that one of the Board agents had recently obtained, and they were doing this even when voters were in the room. During the first three hour voting period, they spent about two hours reading the instruction book trying to understand the phone's different functions. Thibeault testified that one of the Board agents was trying to program her cell phone during the voting sessions. Wall testified about the cell phone:

> A Well, it was a brand new phone. And she just didn't know how to work it, how to program it or whatever. And, like I said, it was just between when people came to vote, she was, you know, well, which ring do you like, you know. And the other woman from the Labor Relations Board was reading the instruction booklet to her, teaching her how to program it.
>
> But, again, any time anybody came in that room to vote, that got put down and we went to the voting.
>
> Q So there was no use of the cell phone while voters were in the room?
>
> A No. No, there wasn't.

By the second voting session, "she had kind of figured out how to use it," but, again, there was no discussion of the cell phone while voters were in the room. Miller testified that one of the Board agents had a cell phone, but "when the voters came, everything is put away." Baker testified that one of the Board agents "was programming numbers in the phone, but if somebody was in the room, she stopped." Ceccarini testified that during her voting session there were some discussions between the observers and one of the Board agents about the special features on her cell phone at a time when there were no voters in the room.

Thiebault testified that during the voting session at Vernon Hills the Board agents had a newspaper "all over the table" and were reading the paper during most of the voting session, even when voters were in the room. Brytowski testified that the

Board agents were reading magazines and newspapers, but did not testify whether voters were present during this time. Wall testified that in the absence of voters, there was small talk among the observers and the Board agents: "But the minute somebody came in to vote, that was it, they were there to vote, the paper was put down...It was all serious..." Miller testified that newspapers were open, "when there was no people to vote. And when people came to vote, everything was put away." Baker testified that newspapers were on the table, "But when people came into the room, they were packed up and put away." Crawford testified that when no voters were present, the Board agent was reading the newspaper; when a voter came into the room, the paper was put away. Ceccarini testified that at times when there were no voters in the room, one of the Board agents and one of the Employer's observers were reading a newspaper.

Jones testified that during the first voting session, one of the Board agents left the voting area and went to the coffee shop located in the Medical Center and returned about twenty minutes later with coffee for the other Board agent and some of the observers. Thibeault testified that during her observer session at Vernon Hills, one of the Board agents said that she wanted to purchase something at the Worcester Art Museum and she left the voting area and was gone for from thirty five to forty minutes during the voting period. During this period, the other Board agent remained in the voting area. Robert Fox and Catherine Kurjan each testified that they voted at the Vernon Hills voting session and, when they voted, only one Board agent was in the room. Wall, who was one of the Union observers at the Vernon Hills voting session, testified that neither Board agent left the voting area during the voting session. There was some discussion of the Worcester Art Museum during the first voting session and, at the second voting session, the Board agent showed the observers what she bought between the sessions. Thibeault testified that about thirty people voted during the two hour voting session at Vernon Hills and she and Wall agreed that most of the voters appeared at the beginning of the session and after that few voters appeared.

The crux of this objection is the alleged inattentiveness of the Board agents as established by their reading newspapers and programming a cell phone, and the alleged absence of one Board agent for a period of from thirty five to forty minutes. As to the former allegation, I credit the testimony of the Union's witnesses that the Board agents and the observers put away the newspapers and cell phones when voters came into the area. Not only did I find the testimony of these witnesses more credible, but it was also more believable in that the Board agents wouldn't have any hands free to give out ballots if they were as busy with newspapers and cell phones as the Employer's objections allege. However, as regards the latter allegation, I credit the Employer's witnesses, principally Fox and Kurjan, and find that one of the Board agents did leave the voting area for from thirty five to forty minutes.

In *Sawyer Lumber Co., LLC*, 326 NLRB 1331 (1998), the Board stated: "When the integrity of the election process is challenged, the Board must decide whether the facts raise a 'reasonable doubt as to the fairness and validity of the election.'" The Court, in *Elizabethtown Gas Co. v. NLRB*, 212 F.3d 257, 262–263 (4th Cir. 2000), involving alleged Board agent misconduct, stated:

> Where pre-election conduct is alleged to have invalidated a representation election, the party seeking to overturn the election- in this case the Gas Company- bears a heavy burden. The challenging party must prove by specific evidence not only that campaign improprieties occurred, but also that they prevented a fair election...Where, in all the circumstances, an NLRB Agent's conduct does not raise a reasonable doubt about the fairness or validity of the election, even actions that are contrary to NLRB policy do not constitute grounds for setting aside the results of the election.

During the voting sessions, in the absence of voters, the Board agents read newspapers and programmed a cell phone. However, when voters came, everything was put away and, as Wall testified: "It was all serious." Clearly, the newspapers and cell phone did not compromise the fairness and validity of the election. *Amalgamated Industrial Union, Local 76B*, 246 NLRB 727, 731. Similarly, even though I have credited the Employer's witnesses that one of the Board agents was absent from the Vernon Hills voting session for from thirty five to forty minutes, the testimony establishes that there were not many voters at the Vernon Hills session, and that after the initial flow of voters, it was very slow. More importantly, even in the absence of one of the Board agents, there was another Board agent present with the four observers. There is no evidence that the Board agents' conduct herein "tends to destroy confidence in the Board's election process, or which reasonably could be interpreted as impugning the election standards we seek to maintain." *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1967). I therefore find that the Employer has not sustained his burden of proving that the Board agents' actions herein prevented a fair election, and recommend that this objection be overruled.

16. This "objection" is discussed, supra, under Void Ballots.

17. The Board agents improperly denied an employee the opportunity to vote by directing her to leave the polling area and telling her that she was not eligible to vote.

Randall testified that she was waiting to vote behind two people, one of whom was arguing with the Board agent about her eligibility. The employee said that she began her orientation in January, but didn't start working until February. The Board agent asked her to leave the room, which she did. During this argument, neither the Union observer nor the Employer's observer said anything. Brytowski testified that this individual "...came in to vote. Her name was not on the list and...there was some confusion between her start date and her orientation date and she insisted upon voting but she did not vote at that time." Crawford testified that the individual was told that she couldn't vote because she wasn't hired on time, and she left. Apparently, when the Employer prepared the Excelsior list it omitted this employee's name and has presented no evidence to establish that she was eligible. I therefore recommend that this objection be overruled.

18. The Board agents improperly allowed voters, while in the polling area and in the presence of voters, to pass notes to the

Union's observers. This has been previously discussed, supra, under Objection 6, and recommend that it be overruled.

19. When a voter asked the Board agent why she was being challenged, the Board agent inaccurately stated that someone from the Employer and the Union believed that she was not eligible to vote, which was inaccurate and left the false impression that the Employer did not want her to vote. This involves Randall, who testified that when she came to vote she was challenged by the Union observer. When she asked why she was being challenged, the Board agent said, "Someone from the Union and *someone from the Administration* does not believe that you are eligible to vote." She voted a challenged ballot (and I have found, supra, that the challenge should be overruled and that her ballot should be counted) and the challenge list states that she was challenged by the Union. I find it highly unlikely that the Board agent would tell her that someone from the Union and someone from the Administration felt that she was not eligible to vote after she was challenged by the Union observer and the Board agent wrote that she was challenged by the Union. Regardless, she voted a challenged ballot, which will be counted and testified as a witness for the Employer herein. There is no evidence that her vote, or that of any other employee, was affected by the alleged statement by the Board agent. I recommend that this objection is overruled.

20. In addition to the conduct described above, the Board agents engaged in other conduct which interfered with the results of the election. As no additional evidence was produced regarding this objection, I recommend that it be overruled.

21. The election procedures were tainted by actions of the Massachusetts Nurses Association, creating an atmosphere of fear and reprisal such as to render a fair election impossible. No evidence was produced regarding this objection, and I recommend that it be overruled.

22. The Union, through its agents and supporters were allowed to gather in a group and remain in and around the polling areas while the polls were open and employees were voting.

Brytowski, an Employer observer at the final two voting sessions at the Medical Center, testified that on one occasion the Union observer left, by herself, to use the bathroom, and was gone for from fifteen to twenty minutes. She could see through the glass door that, on her way back, the observer was speaking to some employees, although she does not know what was said. The only employee whom she could identify was Fradine John Baptiste. She told the Board agent what was happening, and the Board agent told the employees outside the doorway to leave, and they left the area. Ceccarini, the Union observer for the final voting session, testified that at one point some employees were congregating in the hallway outside the voting area, but the Board agent asked them to leave, and they left the area. When she left to use the bathroom, nobody was standing in the hallway.

The evidence establishes that some employees were standing outside the conference room where the election was conducted, but when the Board agent was made aware of their presence, she asked them to leave, which they did. There is no evidence that there were an improper communications between the Union observers and anybody preparing to vote. I recommend that this objection be overruled. *Michem*, supra.

23. The Union misled voters by, among other things, falsely stating that no Union dues would be charged for two years, the employees would never pay Union dues or initiation fees, and that the Union had negotiated a contract with Tenet, statements designed to intentionally mislead employees into supporting the Union. One aspect of this objection, the waiver of initiation fees, is discussed supra in objection 5. There was no evidence introduced to support the balance of this objection, and I recommend that it be overruled.

24. The Union engaged in similar, related in other conduct which interfered with the election. As there was no evidence proffered to support this objection, and I recommend that it be overruled.

25. The conduct described above, singularly and/or cumulatively, interfered with the election and/or rendered a fair election impossible. The gravamen of this objection, as argued in the Employer's brief, is that in close elections such as this, the objections should be more closely scrutinized and, apparently, even if all of the objections are overruled, put together, they may cumulatively have affected the results of the election.

Counsel for the Employer is correct that when the election results are close, objectionable conduct receives close scrutiny. In *NLRB v. Mr. Porto, Inc*., 590 F.2d 637, 639 (6th. Cir 1978), the Board found the union's conduct to be isolated incidents that occurred two months prior to the election and that their effect had been dissipated. Because of the closeness of the vote, and the small unit size, the Court disagreed and overturned the result of the election, stating, "a close election is a factor which demands that even minor infractions be scrutinized carefully." Similarly, in *NLRB v. V&S Schuler Engineering, Inc*., 309 F.3d 362, 372 (6th Cir. 2002), the Court stated: "Given the extreme closeness of the election, the Company's misconduct can taint the election result easier." However, as I have found no objectionable conduct on the part of the Union, there can be no cumulative effect. Therefore, in the absence of any valid objections herein, I recommend that this objection be overruled as well.

Conclusions

Based upon the above, I recommend that the two ballots declared void be counted as "No" votes, that the challenges to the ballots of Marcucci, Aubin, Rubio, Lidonde, Cormier, Zaleski and Goding be sustained, that the challenges to the ballots of Bernard, Ohman, Randall, Jones, Bath, Pilat and Hall be overruled and their ballots be opened and counted, and that all of the Employer's objections be overruled. The Regional Office, after opening and counting the ballots herein, shall issue a Revised Tally of Ballots and an appropriate certification, depending upon which party receives a majority of the votes cast.